88-201

Supreme Court, U.S.
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NO.

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1987

THE STATE OF FLORIDA

Petitioner,

vs.

RIGOBERTO CASO

Respondent.

* * * * * * * * * * * * * *

ON WRIT OF CERTIORARI TO THE
FLORIDA SUPREME COURT

* * * * * * * * * * * * * *

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QUESTION PRESENTED

WHETHER A PERSON WHO VOLUNTARILY ACCOMPANIES THE POLICE TO THE STATION, IS QUESTIONED FOR A SHORT PERIOD OF TIME, AND IS THEREAFTER PERMITTED TO LEAVE, IS IN CUSTODY FOR PURPOSES OF MIRANDA V. ARIZONA, 384 U.S. 436, 86 S.CT. 1602, 16 L.ED.2D 694 (1966), SOLELY BASED UPON THE FACT THAT HE WAS ASKED TO LEAVE HIS PLACE OF EMPLOYMENT DURING THE DAY, HE DID NOT INITIATE CONTACT WITH THE POLICE, AND HE WAS NOT INFORMED THAT HE WAS NOT UNDER ARREST PRIOR TO QUESTIONING.

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO
THE FLORIDA SUPREME COURT

The Petitioner, the State of Florida, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Florida Supreme Court, entered in the above-entitled proceeding on June 1, 1988.

OPINIONS BELOW

The opinion of the Supreme Court of Florida is reported at __ So.2d __, Case No. 70,145 (Fla. April 7, 1988)[13 F.L.W. 249] The full opinion is included in the appendix to this petition as Exhibit "A". (App. 1-21).

The order denying the state's motion for rehearing is reproduced in the appendix as Exhibit "B". (App. 22).

JURISDICTION

The opinion of the Florida Supreme Court was entered on April 7, 1988, reversing respondent's conviction. The Florida Supreme Court denied a timely motion for rehearing on June 1, 1988. This petition is filed within 60 days of that denial. The jurisdiction of this

Court is invoked under 28 U.S.C. §1257 (3).

CONSTITUTIONAL PROVISIONS INVOLVED

The pertinent part of the Fifth Amendment to the United States Constitution provides:

> [N]or shall any person. . . be compelled in any criminal case to be a witness against himself. . .

The pertinent part of the Fourteenth Amendment to the United States Constitution provides:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law. . .

STATEMENT OF THE CASE

On August 1, 1984, the Respondent, **RIGOBERTO CASO**, was charged with two counts of first degree murder and one count of burglary. After police officers discovered the bullet riddled bodies of Norma Montecino and Luis Murgado in a residence in Hialeah, Florida, they received information from a confidential informant that the Respondent had participated in the killings. Accordingly, two Hialeah detectives went to the Respondent's place of employment in order to discuss the investigation. The detectives, who were in an unmarked vehicle and donned plain clothes, approached the Respondent, identified themselves as police officers, and produced police identification. The detectives asked

the Respondent if he would voluntarily accompany them to the police station. After receiving permission from his supervisor, the Respondent agreed to accompany the officers. Prior to leaving, the Respondent asked how he would get back to his place of employment. The detectives stated that they would take him back. The Respondent was not placed under arrest or handcuffed.

After arriving at the police station, the Respondent went with the detectives to an interview room and was presented with an advice of rights form, translated from English to Spanish, which purported to advise him of his Miranda rights. The defendant was informed that he had the right to

remain silent; that anything he said could be used against him in a tribunal or court of law; that he had the right to consult with an attorney before he was questioned and the right to the presence of his attorney during the interrogation. He was further advised that if he decided to answer any questions without the presence of an attorney, he had the right to terminate questioning at any time and the right to consult with an attorney. The translated rights form did not, however, advise the Respondent of the right to appointed counsel at the state's expense if he could not afford an attorney. The Respondent agreed to speak with the detectives.

The detectives informed the Respondent of the information that they had received concerning his involvement in the homicides. The Respondent initially denied any knowledge of the offense but then stated that he would verify the information that the detectives possessed. The Respondent then began to discuss the case and admitted his participation therein. After approximately one hour, the Detectives drove the Respondent back to his place of employment and departed. At trial, the defendant was asked if he requested to leave the police station, to which he responded, "I never wanted to leave because -- I never wanted to leave because I had no reason to. I had no reason to flee there."

During trial, the Respondent moved to exclude his admissions based upon the inadequacy of the advice of rights form. The prosecuting attorney argued that the Respondent was not in custody and Miranda warnings were not required. The trial court determined that Caso was in custody, stating, "Any time you are going to formally interrogate somebody that's a suspect. . . I think you have to be in custody." The trial court nonetheless permitted the State to introduce the Respondent's statements, finding that the advice of rights form was sufficient to inform the Respondent of his rights and that he made a knowing and voluntary waiver thereof. The Respondent was convicted of two counts of second degree murder and one count of burglary.

The Supreme Court of Florida reversed the Respondent's convictions and remanded for a new trial, holding that the trial court had improperly admitted the Respondent's statements at trial. While recognizing that the trial judge had improperly concluded that the Respondent was in custody merely because he was a suspect and was being questioned by the police, the Supreme Court nonetheless accepted that determination, reasoning as follows:

> As in Drake v. State, 441 So.2d 1079 (Fla. 1983), cert. denied, 466 U.S. 978 (1984), in which this Court determined the defendant was in custody at the time of making a statement to the police, Caso was asked to leave his place of employment in the middle of the day. Contrary to the defendants in Beheler and Mathiason, Caso did not initiate the contact with the police. Moreover, Caso was interrogated at the police station and was not

> specifically informed that he was not under arrest, despite being confronted with evidence which implicated him in the crime, factors which, although not dispositive, may bear on the question of whether a person was in custody for Miranda purposes.

(A. 13).

The court accordingly concluded that the Respondent was in custody and applying the principles established in Oregon v. Elstad, 470 U.S. 298 (1985) and Michigan v. Tucker, 417 U.S. 433 (1974), held that the defective warnings were insufficient to permit introduction of the Respondent's statements. Without use of Respondent's admissions, a retrial is impossible.

REASONS FOR GRANTING THE WRIT

THE DECISION OF THE COURT BELOW OVERBROADLY CONSTRUES MIRANDA V. ARIZONA, 384 U.S. 436 (1966), TO REQUIRE WARNINGS IN A NONCUSTODIAL SETTING WHERE A PERSON HAS NOT BEEN DEPRIVED OF HIS FREEDOM OF ACTION IN ANY SIGNIFICANT WAY.

In Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), this Court established a procedural safeguard to protect against compelled self-incrimination. It is clear, however, that the safeguard does not apply, "outside the context of the inherently custodial interrogations for which it was designed." Roberts v. United States, 445 U.S. 552, 100 S.Ct. 1358, 63 L.Ed.2d 622 (1980). See Minnesota v. Murphy, 465 U.S. 426, 104 S.Ct. 1136, 79

L.Ed.2d 409, 466 U.S. 945 (1984). It is only when a person is subjected to "questioning initiated by law enforcement officers after [he] has been taken into custody or otherwise deprived of his freedom of action in any significant way" that Miranda warnings are required. Miranda v. Arizona, 384 U.S. at 444. The court below ignores these well settled principles by holding that Miranda warnings were required in the instant case. A brief review of past decisions of this court demonstrates the patent misapplication of the guidelines established therein by the court below.

In determining whether a person is "in custody" pursuant to Miranda, an objective, reasonable man standard is applied. Berkemer v. McCarty, 468 U.S. 420, 104 S.Ct. 3138, 82 L.Ed.2d 317 (1984). Thus the sole concern of a reviewing court is to determine whether a reasonable man in the suspect's position would feel a restraint on his freedom of movement of the degree associated with a formal arrest. Minnesota v. Murphy, supra; California v. Beheler, 463 U.S. 1121 (1983).

In Oregon v. Mathiason, 429 U.S. 492, 97 S.Ct. 711, 50 L.Ed.2d 714 (1977), this Court held that the totality of the circumstances

did not render the suspect "in custody" for Miranda purposes. In that case a police officer initiated contact with Mathiason by leaving his card at his apartment asking that he call him. Mathiason called the officer and agreed to meet with him at the state patrol office. After meeting in the hallway of the office, Mathiason was taken in a room and advised that he was not under arrest. The door of the room was closed and the officer proceeded to tell Mathiason that he wanted to talk to him about a burglary. Mathiason was advised that his truthfulness would possibly be considered by the district attorney or judge and further that the officer believed

that he was involved in the theft because his fingerprints were found at the scene. The information concerning the fingerprint evidence was false. Mathiason confessed to the offense. After approximately one half hour, he was permitted to leave. In reversing the Oregon Supreme Court's determination that Mathiason was in custody, this Court stated:

> In the present case, however, there is no indication that the questioning took place in a context where respondent's freedom to depart was restricted in any way. He came voluntarily to the police station, where he was immediately informed that he was not under arrest. At the close of a 1/2 hour interview respondent did in fact leave the police station without hindrance. It is clear from these facts that Mathiason was not in custody "or otherwise deprived of his freedom of action in any significant way.

This Court further held that neither the fact that the interview took place in a "coercive environment"; or that the questioning of a suspect took place at the station house; or that the officer made false statements concerning the evidence discovered at the scene, rendered Mathiason "in custody", because none of these factors restricted his freedom to depart in any way.

Subsequent to the decision in Oregon v. Mathiason, supra, this Court again reviewed the decision of a lower court which erroneously held that a suspect was in custody during a station house ques-

tioning. In California v. Beheler, 463 U.S. 1121, 103 S.Ct. 3517, 77 L.Ed.2d 1275 (1983), Beheler was involved in a killing and called the police to the scene. At that point, Beheler told the police that one of his friends had committed the killing and that the gun was hidden in his backyard. Beheler consented to a search of his yard and the gun was discovered. Later that evening Beheler voluntarily agreed to accompany the police to the station house, after being advised that he was not under arrest. At the station house, Beheler was questioned for approximately thirty minutes without being advised of his Miranda rights. He was then

permitted to leave. Five days later he was arrested and charged with murder.

The California Court of Appeals reversed Beheler's conviction holding that the interview constituted a custodial interrogation without benefit of Miranda warnings, focusing on the fact that the interview took place in the station house, that before the interview the police had identified Beheler as a suspect, and that the interview was designed to produce incriminating statements. This Court, in curt fashion, summarily reversed the California Court of Appeals, reiterating the standards

established in Oregon v. Mathiason, supra, holding that it was "beyond doubt that Beheler was neither taken into custody nor significantly deprived of his freedom of action." California v. Beheler, supra, 463 U.S. at 1123.

The decision below directly conflicts with the well-established precedent of this Court concerning custodial questioning. As previously noted, the undisputed facts are that the defendant was approached at work by two police officers and asked if he would come with them to the police station. Before agreeing to go, Caso received permission from his boss and asked how he would get back to

work. The officers stated that they would bring him back.

Upon arriving at the station, Caso was taken to a room, advised of various constitutional rights, and advised of the information that the police had implicating him in the crime. Caso eventually verified the information and was returned to his place of employment after approximately one hour. In holding that the interview constituted a custodial interrogation requiring Miranda warnings, the Supreme Court of Florida relied solely upon the facts that Caso was asked to leave his place of employment in the middle of the day, that Caso did

not initiate the contact with the police, and that Caso was not specifically informed that he was not under arrest. These facts do not establish that Caso was in custody, however, where his freedom of action was never restricted in any way. California v. Beheler, supra.

Initially, the fact that Caso was asked to leave his place of employment during the day is wholly irrelevant to the question of whether there was a restraint on Caso's movement. Certainly, a request from police officers, during day hours, to voluntarily accompany them to the station for questioning is neither unreasonable

nor coercive. The fact is, Caso voluntarily agreed to accompany the officers, without coercive pressure of any sort. The locale of the request was not a factor of significance in this case.

Secondly, the fact that Caso did not initiate contact with the police likewise does not convert the encounter into a custodial interrogation. In Oregon v. Mathiason, supra, the police initiated contact with Mathiason, as was specifically recognized by this Court in California v. Beheler, supra. Likewise, the police initiated contact with the defendant in Beckwith v. United States, 425 U.S. 341, 96 S.Ct.

1612, 48 L.Ed.2d 1 (1976), another case in which this Court determined that the defendant was not in custody for purposes of Miranda. Clearly, where a suspect is contacted by the police and voluntarily agrees to a meeting, he is not considered " in custody" by mere virtue of the police request.

Finally, the fact that Caso was interrogated at the police station and was not informed that he was not under arrest does not render him in custody in the instant case. While both Mathiason and Beheler were advised that they were not under arrest prior to the station house interrogation, Caso was specifically advised that the

officers would bring him back to his place of employment subsequent to the interview. In fact, they did just that. Accordingly, the assurances of the officers were clearly sufficient to inform the defendant that he was not under arrest. While Caso was not informed that he was not under arrest, the totality of the circumstances indicates a lack of custody. See Davis v. Allsbrook, 778 F.2d 168 (4th Cir. 1985).

Accordingly, the decision of the Supreme Court of Florida ignores the dictates of this Court which hold that the ultimate inquiry in determining custody is whether there is a formal arrest or

restraint of movement of the degree associated with a formal arrest. Oregon v. Mathiason, supra. The defendant voluntarily accompanied the officers to the station, was questioned for one hour, and was returned to his place of employment. The Florida Supreme Court opinion is devoid of any indication of official coercion or facts demonstrating a restraint of Caso's movement. As such, there was no basis upon which to hold that the defendant was in custody and to suppress his admissions of involvement in this double homicide. The blatant expansion of the application of Miranda to noncustodial settings such as in the instant case will wreak havoc

in both law enforcement and the judicial review of the actions of law enforcement officials. As in Oregon v. Mathiason, supra and California v. Beheler, supra, this Court should summarily reverse the lower court and reaffirm the principle that a person is "in custody" for Miranda purposes only where there is a formal arrest or restraint on freedom of movement of the degree associated with formal arrest.

CONCLUSION

Based upon the foregoing, petitioner requests this Court to issue its Writ of Certiorari in this cause.

Respectfully submitted,

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APPENDIX

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SUPREME COURT OF FLORIDA

No. 70,145

RIGOBERTO CASO, Petitioner,
vs.
STATE OF FLORIDA, Respondent.

[April 7, 1988]

EHRLICH, J.

We have for review Caso v. State, 501 So.2d 646 (Fla. 3d DCA 1986), in which the district court certified a question as one of great public importance. We have jurisdiction. Art. V, §3 (b)(4), Fla.Const.

On May 12, 1983, Norma Montecdino and Luis Murgado were murdered at a residence in Hialeah, Florida. On or about July 7, 1983, the Hialeah Police Department received information from at least one confidential informant that

Caso, as the "wheelman," had participated in the crime with two other individuals. Based upon this information, two detectives went to Caso's place of employment in October of 1983, displayed identification and asked if Caso would voluntarily go to the police station and talk to them. Caso asked his employer if this would be okay and then agreed to go. Caso asked the detectives how he would return to work and one of the detectives informed Caso that he would take him back.

After arriving at the police station, Caso was taken to an interrogation room where officers confronted him with the information they had gathered that implicated him in the crime. Caso was then presented with an

advice of rights form which did not advise him of the right to appointed counsel at the state's expense if he could not afford an attorney. The officers testified that Caso eventually verified the information that the detectives already had and was then returned to his place of employment. The interrogating detectives then proceeded to the State Attorney's office, where they related the information that they had obtained from Caso to the Assistant State Attorney in charge of the investigation. A warrant was then issued for Caso's arrest.

Caso's defense counsel objected at trial to the testimony of the detectives that revealed the confession. The objection was based upon the inadequency

of the advice of rights form, which failed to state that an attorney would be appointed if the defendant could not afford one. The prosecuting attorney responded that Caso was not in custody and Miranda warnings were therefore not required. The trial court stated: "That's not so. Any time you are going to formally interrogate somebody that's a suspect. . . I think you have to be in custody." Although finding that Caso was in custody at the time of the interrogation and the advice of rights form could have been better, the trial court concluded that the confession was voluntary and made with full knowledge of his rights. The jury found Caso guilty of two counts of second-degree murder and one count of burglary of a structure. Caso was sentenced to two concurrent terms of life imprisonment.

On appeal, the district court noted that the trial court's finding that Caso was in custody was supported by substantial competent evidence. 501 So.2d at 646 n. 1. In regard to the adequacy of the Miranda warnings given to Caso prior to his questioning, the district court stated that despite Caso's "thoughtful and well-presented arguments," it was bound by stare decisis to follow Alvord v. State, 322 So.2d 533 (Fla. 1975), cert. denied, 428 U.S. 923 (1976). In Alvord, this Court held that the failure of a police officer to include in a Miranda warning the advice that an attorney would be appointed to represent the defendant if he were indigent did not require exclusion of the defendant's statements to the police officer. The district

court accordingly affirmed Caso's convictions and sentences, but certified the following question as having a great effect on the proper administration of justice:

> Whether the decision in Alvord v. State, 322 So.2d 533 (Fla. 1975), holding admissible in the State's case-in-chief the defendant's confession obtained in a post-Miranda custodial interrogation and in the absence of advise regarding the defendant's right to appointed counel if he could not afford an attorney, should be reexamined in light of Oregon v. Elstad, 470 U.S. 298 (1985).

We answer the certified question in the affirmative.

We first address the issue of whether Caso was in custody at the time of questioning by the detectives. In

Miranda, the United States Supreme Court established a procedural safeguard to protect an individual's fifth amendment privilege against compelled self-incrimination from the coercive pressures of custodial interrogation. Miranda v. Arizona, 384 U.S. 436 (1966). The procedural safeguard does not, however, apply "outside the context of the inherently coercive custodial interrogations for which it was designed." Roberts v. United States, 445 U.S. 552, 560 (1980). The police are required to give Miranda warnings only when the person is in custody. California v. Beheler, 463 U.S. 1121, 1124 (1983). In determining whether a suspect is in custody, "the ultimate inquiry is simply whether there is a 'formal arrest or restraint on freedom

of movement' of the degree associated with a formal arrest.'" Id. at 1125 (quoting Oregon v. Mathiason, 429 U.S. 492 (1977)). At this Court and the United States Supreme Court have previously recognized, "the only relevant inquiry is how a reasonable man in the suspect's position would have undestood his situation." Roman v. State, 475 So.2d 1228, 1231 (Fla. 1985), cert. denied, 475 U.S. 1090 (1986) (quoting Berkemer v. McCarty, 468 U.S. 420, 442 (1984)).

The statements by the trial judge regarding custody in the present case indicate that the judge felt Caso was in custody because he was a suspect and was being questioned by the police. Therefore, we agree with the state that

the trial court's finding of custody was not based upon proper analysis. We decline, however, to accept the state's argument that because the trial court failed to apply the correct standard in determining the issue of custody the trial court's decision cannot be sustained. A conclusion or decision of a trial court will generally be affirmed, even when based on erroneous reasoning, if the evidence or an alternative theory supprts it. See Applegate v. Barnett Bank of Tallahassee, 377 So.2d 1150 (Fla. 1979); Cohen v. Mohawk, Inc., 137 So.2d 222 (Fla. 1962). A trial court's findings regarding whether a suspect was in custody are clothed with a presumption of correctness and will not be overturned if there is competent,

substantial evidence which would support the decision under the correct analysis. Cf. Acensio v. State, 497 So.2d 640 (Fla. 1986)(a trial court's findings in regard to whether a confession was freely and voluntarily given are clothed with a presumption of correctness).

The state relies upon the decisions of the United States Supreme Court in Beheler, 463 U.S. 1121, and Mathiason, 429 U.S. 492, in which the Court held that the defendants were not in cutody, in support of its argument that the trial court's determination was erroneous. The district court below correctly noted, however, that there was competent, substantial evidence upon which the trial court could have based a finding that Caso was in custody at the

time he was questioned by police. As in Drake v. State, 441 So.2d 1079 (Fla. 1983), cert. denied, 466 U.S. 978 (1984), in which this Court determined the defendant was in custody at the time of making a statement to the police, Caso was asked to leave his place of employment in the middle of the day. Contrary to the defendants in Beheler and Mathiason, Caso did not initiate the contact with police. Moreover, Caso was interrogated at the police station and was not specifically informed that he was not under arrest, despite being confronted with evidence which implicated him in the crime, factors which, although not dispositive, may bear on the question of whether a person was in custody for Miranda purposes. See Drake, 441 So.2d at 1081; Roman, 475

So.2d at 1231. The record contains facts which are sufficient to support a conclusion that Caso was in custody at the time of his questioning by the police. Accordingly, the district court below did not err in indulging the presumption in favor of the validity of the lower court's ruling.

As to the question certified by the district court below, Caso contends that this Court's opinion in Alvord signified a marked departure from established state and federal precedent in which it had consistently been ruled that a defendant's custodial confession, given without the full Miranda warning, was inadmissible in the state's case-in-chief. Caso argues that it is clear from the decisions in Oregon v. Elstad,

470 U.S. 298 (1985) and Michigan v. Tucker, 417 U.S. 433 (1974), that a defendant's confession is inadmissible under the circumstances present in Alvord and the case at bar.

In reaching the decision in Alvord v. State, this Court relied on Michigan v. Tucker, in which the United States Supreme Court was "asked to extend the Wong Sun fruits doctrine to suppress the testimony of a witness for the prosecution whose identity was discovered as the result of a staement taken from the accused without benefit of full Miranda warnings." Oregon v. Elstad, 470 U.S. at 308. See Wong Sun v. United States, 371 U.S. 471 (1963). As in Alvord and the present case, police officers in Tucker failed to

advise respondent that he would be furnished counsel free of charge if he could not pay for such services himself.

The Supreme Court stated that the "procedural safeguards [in Miranda] were not themselves rights protected by the Constitution but were instead measures to insure that the right against compulsory self-incrimination was protected." 417 U.S. at 444. The Supreme Court concluded that the facts demonstrated that the defendant had not been deprived by police of his privilege against compulsory self-incrimination, noting that "the record in this case clearly shows that respondent was informed that any evidence taken could be used against him. The record is also clear that respondent was asked whether

he wanted an attorney and that he replied that he did not." Id. at 444-45 (footnotes omitted). Because there was no actual infringement on the respondent's constitutional rights, the Court determined that admissibility of the witness's testimony was not controlled by the doctrine expressed in Wong Sun. Id. at 445-46.

Because there was no controlling precedent regarding the issue of admissibility of the "fruits" of a confession obtained without full Miranda warnings, the Tucker Court examined the matter as a question of principle. The two principles that governed were the deterrent effect on police conduct and protection of courts from untrustworthy evidence. The Tucker Court concluded

that "[w]hat ever deterrent effect on future police conduct the exclusion of those statements may have had, we do not believe it would be significantly augmented by excluding the testimony of the witness Henderson as well." 417 U.S. at 448. Accordingly, the "fruits" of the defendant's unwarned statement did not have to be excluded.

It was from the analysis of the deterrent value in suppressing the witness's testimony that the Alvord opinion drew support. The Tucker Court's discussion of the additional deterrent of suppressing the fruit of the Miranda violation, however, provides no support for admitting the confession itself. As Justice Rehnquist noted in Tucker, it was significant that the

"statements actually made by respondent to the police. . . were excluded at trial in accordance with Johnson v. New Jersey, 384 U.S. 719 (1966)." 417 U.S. at 448. Therefore, it appears that reliance upon Tucker in Alvord may have been misplaced.

Further support for the conclusion that this Court may have misinterpreted Michigan v. Tucker in the Alvord decison is found in Oregon v. Elstad, a recent decision of the United States Supreme Court. Justice O'Connor, in an overview of the Miranda exclusionary rule, noted that the fifth amendment only prohibits the use of compelled testimony by the prosecution in its case in chief, but stated that the "[f]ailure to administer Miranda warnings creates a presumption

of compulsion. Consequently, unwarned statements that are otherwise voluntary within the meaning of the fifth amendment must nevertheless be excluded from evidence under Miranda. Thus, in the individual case, Miranda's preventive medicine provides a remedy even to the defendant who has suffered no identifiable constitutional harm." 470 U.S. at 307. Justice O'Connor pointed out that the presumption of coercion did not bar use of the statements and their fruits for such purposes as impeachment on cross-examination. In illustration, Justice O'Connor discussed the rule of law established in Tucker, stating that the "unwarned confession must, of course, be suppressed," but "introduction of the third-party witness' testimony did not

violate Tucker's Fifth Amendment rights." Id. We therefore recede from that portion of Alvord which holds that the trial court did not err in admitting the custodial statements of the defendant. We hold that the failure to advise a person in custody of the right to appointed counsel if indigent renders the custodial statements inadmissible in the prosecution's case-in-chief and Caso's statement in the present case was improperly admitted.

The erroneous admission of statements obtained in violation of Miranda rights is subject to harmless error analysis. Kight v. State, 512 So.2d 922, 926 (Fla. 1987). Caso correctly contends that the admission of his confession constituted reversible

error. The testimony of the police officers regarding Caso's statement was the only evidence presented at trial connecting Caso to the murders. We cannot declare a belief beyond a reasonable doubt that the impermissible admission of the contents of Caso's confession did not affect the jury verdict. See State v. DiGuilio, 491 So.2d 1129 (Fla. 1980). The error was, therefore, not harmless.

Accordingly, we quash the decision below affirming Caso's conviction and remand to the district court with directions to remand the case to the trial court for a new trial.

It is so ordered.

OVERTON, SHAW, BARKETT, GRIMES and

KOGAN, JJ., Concur McDONALD, C.J., Dissents

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

Application for Review of the Decision of the District Court of Appeal - Certified Great Public Importance

Third District - Case No. 85-1538

Bennett H. Brummer, Public Defender, Eleventh Judicial Circuit, Miami, Florida; and Lisa Berlow-Lehner, Special Assistant Public Defender, Miami, Florida for Petitioner

Robert A. Butterworth, Attorney General, and Michael J. Neimand and Julie S. Thornton, Assistant Attorneys General, Miami, Florida, for Respondent.

SUPREME COURT OF FLORIDA

Wednesday, June 1, 1988

CASE NO. 70,145

RIGOBERTO CASO

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

Upon consideration of the motion for rehearing filed in the above cause by attorney for Respondent, and response thereto, it is ordered that said be and the same is hereby denied.

OVERTON, EHRLICH, SHAW, BARKETT, GRIMES and KOGAN concur, McDonald, C.J. Dissents

A True Copy

TEST
Sid J. White, Clerk, Supreme Court

SUPREME COURT OF FLORIDA

TUESDAY, JUNE 21, 1988

CASE NO. 70,145

RIGOBERTO CASO,

PETITIONER,

vs.

STATE OF FLORIDA,

RESPONDENT.

_____/

Motion to Recall the Mandate Pending Review from Respondent is hereby denied.

cc: Julie S. Thornton, Esquire
Lisa M. Berlow-Lehner, Esquire

A TRUE COPY

TEST
Sid J. White, Clerk, Supreme Court

(9)

Supreme Court, U.S.
FILED
OCT 12 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-201

In The

Supreme Court of the United States

October Term, 1988

GERALD E. MANSELL,

Appellant,

v.

GAYE M. MANSELL

Appellee.

ON APPEAL FROM THE COURT OF APPEAL OF CALIFORNIA FIFTH APPELLATE DISTRICT

RESPONSE, AND DOCUMENTS IN SUPPORT OF RESPONSE, TO THE MOTION OF UNITED STATES FOR LEAVE TO FILE AS AMICUS CURIAE

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RESPONSE, AND DOCUMENTS IN SUPPORT OF RESPONSE, TO THE MOTION OF UNITED STATES FOR LEAVE TO FILE AS AMICUS CURIAE

Gaye M. Mansell, Appellee herein, objects to the motion filed by the Solicitor General, on behalf of the Government, and respectfully requests this Court deny the motion.

The position of the Government in this matter is a direct result of a lack of due diligence on the part of the Government. Appellee has had no part in the decision making process of the Government, and has not in any way impeded the Government in their actions. The Appellee is now the one being directly punished as the

result of the lack of due diligence by the Government. The lackadaisical approach taken by the Government in this action should not be condoned by allowing them to file their brief more than forty-five days after the date it was due, and also after the briefs in response have been filed by the Appellee and the Amicus Curiae for the Appellee.

The Government was asked to file a brief as amicus curiae in this matter on December 7, 1987, and did file such a brief on June 7, 1988. This Court noted probable jurisdiction in this matter on June 27, 1988, making Appellant's brief due August 11, 1988. An extension was granted Appellant to file his brief until August 25, 1988.

On September 6, 1988, two weeks after the deadline for filing all briefs on behalf of the Appellant, the Government indicated they were intending to file an additional brief in support of the position of the Appellee and requested the Appellee seek an extension of time to assist in the filing of that brief by the Government. On September 7, 1988, the Government filed its motion with this Court for divided argument. On September 9, 1988, the Appellee requested the time for the filing of the brief on the merits be extended to October 8, 1988, which was granted by this Court on September 14, 1988.

On September 26, 1988, the Government indicated to this Court they wanted to defer action on the motion for divided argument pending further consideration. A copy of that request was received by Appellee on September 30, 1988.

On September 28, 1988, Appellee contacted the Government, after having received no contact from the Government for several weeks, and was informed the Government was reviewing its position and might change its position. Further contact from Mr. Thomas Merrill, Deputy Solicitor General, indicated an additional extension of time within which to file the briefs would receive favorable treatment by the Clerk of the Court, making the expensive and time consuming filing of a supplemental brief unnecessary.

As indicated in the supporting documents, the brief for Appellee had to be off to the printers by the 30th of September in order to have sufficient time to make all corrections necessary before the final brief was filed by October 8th.

After discussing the matter with the Assistant Clerk of this Court, it was determined the only grounds for seeking an additional extension would be the brief reportedly being filed by the Government, and that no other grounds existed, nor would any other grounds be fabricated.

Indications from the Assistant Clerk were that the filing of the brief by the Government in which they changed their position may or may not be relied upon as sufficient grounds for an extension. Based on such information, the Appellee filed her brief on the merits on October 6, 1988.

On October 4, 1988, the Government indicated their motion for divided argument should be withdrawn from the Court's calendar, and such communication was received by Appellee on October 6, 1988. The motion to

which this response is being filed was received on October 11, 1988.

Based upon the foregoing series of events, it can be seen the Appellee has been greatly prejudiced. The Government had more than ample time to review the situation, and review the appropriate position it wished to take in this matter. *The Government's decision to change position was not communicated until after Appellee contacted the Government.* One can only wonder when, if ever, the Government intended to inform Appellee.

The decision was made so late in the briefing process, Appellee had no choice but to file her brief on the merits. By thus filing, the Appellee is now faced with the prospect of seeking the permission of this Court to file a supplemental brief in response to any points raised by the Government. Further, the Amicus Curiae that filed in support of the position of the Appellee is now prevented from commenting on the brief of the Government even though the rules of this Court anticipate allowing such amicus curiae to so comment. It is questionable if the limited funds of the Amici would permit filing such a brief.

The Solicitor General states in his motion the Government will present new materials not cited by any other party. This rationale is, under the circumstances, dubious at best. Between all the cases, reports, hearing transcripts, law review articles, and the like, a small library could be cited were it not for page limitations. There is no doubt Appellee could write a supplemental brief citing materials not cited by any other party to date, including the Government.

Appellee has now been placed in the position of expending more time, and expense, in responding to the position of the Government when such position, had the Government acted with due diligence, should have been known within the time limits allowed to the Appellant in this matter.

CONCLUSION

For the foregoing reasons, and the further reasons set forth in the Declaration of Dennis A. Cornell, and the Declaration of Cathryn A. Lamb, the motion of the United States to file as amicus curiae should be denied by this Court.

Respectfully submitted,

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APPENDIX

Declaration of Dennis A. Cornell, Counsel for Appellee

I, Dennis A. Cornell, declare:

1. I am the attorney for the Appellee, Gaye M. Mansell.

2. On December 7, 1987, this Court requested the Government file a brief as amicus curiae in this matter.

3. On June 7, 1987, the Government filed its brief with this Court indicating the position of the Appellee should prevail, but that probable jurisdiction should be noted to resolve the question once and for all.

4. On June 27, 1987, this Court noted probable jurisdiction.

5. On August 25, 1988, the time within which the Appellant's brief on the merits should be filed, and all briefs of amicus curiae in support should be filed, expired.

6. On September 6, 1988, Christine Desan Husson, Assistant to the Solicitor General, contacted your declarant, and indicated the Government wished to file an additional brief on the merits in support of the position of the Appellee, and further requested Appellee seek an extension of time so the Government could file such a brief.

7. On September 7, 1988, the Government filed its motion with this Court for divided argument which motion reflected the agreement of Appellee to assign a portion of time for her argument to the Government.

8. On September 9, 1988, Appellee sought an extension of time due to calendaring conflicts resulting from the original extension having been granted to Appellant.

9. On September 14, 1988, this Court granted an extension until October 8, for Appellee to file her brief on the merits.

10. On September 28, 1988, *your declarant contacted Ms. Desan Husson by phone to determine the progress of the brief as your declarant had not had any contact with the Government since the conversation of September 6th.* At that time, Ms. Desan Husson indicated the Government was more than likely going to change their position on the matter and was going to support the position of the Appellant. Ms. Desan Husson further indicated the Government would assist with the Clerk's Office to obtain another extension of time so Appellee's brief on the merits could address the brief being filed by the Government.

11. Your declarant informed Ms. Desan Husson in the conversation of September 28, 1988, the time requirements of the printer required the brief on the merits of the Appellee be sent to the printer on September 29, 1988 in order for the brief to be filed within the time required by this Court. Ms. Desan Husson indicated her superior would be in contact with the Court and would make it easier for Appellee to obtain an extension so the time requirements would not be so severe.

12. Later in the day on September 28, 1988, Tom Merrill, Deputy Solicitor General, contacted your declarant and indicated he had discussed the matter with the Clerk's Office of the Supreme Court and had received an

indication Appellee could obtain an extension as a result in the change of position being taken by the Government. Mr. Merrill further indicated a final decision by the Government as to whether or not the Government was going to change its position had not yet been made, but that your declarant would be informed as soon as such a decision was made.

13. An additional discussion was had with Mr. Merrill on September 29, 1988, in which Mr. Merrill indicated your declarant should contact Sandy Nelson, the Assistant Clerk of this Court, to determine whether or not an extension could be obtained in order to respond to the change in position which most probably would be taken by the Government. Mr. Merrill further asked if your declarant could wait until later in the following week to send the brief to the printer if an extension were not granted.

14. As it was too late in the day on the 29th to contact this Court, and as your declarant was in trial in another county on September 30th, Cathryn A. Lamb, legal assistant to your declarant, contacted Ms. Nelson at the Court on September 30, 1988. The result of that conversation is contained in her declaration which is included with this response.

15. Apparently, on September 26, 1988, two days prior to your declarant's initiating contact with the Government, the Government filed a request with this Court that its motion for divided argument be deferred pending further consideration. A copy of that request was received by Appellee on September 30, 1988.

16. After the discussions with Ms. Desan Husson and Mr. Merrill, and wanting to discuss the situation with Ms. Nelson, contact was made with the printer to determine the latest possible time the brief could be submitted without incurring significant overtime costs. Based on the representations of the printer, a delay of four days, from September 29th to October 3rd, was scheduled.

17. On September 30, 1988, based on the conversation of Cathryn A. Lamb with Ms. Nelson, and based on the extremely tight printing schedule previously established with the printer, it was decided the brief on the merits of the Appellee should be filed as scheduled and it was sent to the printer on the morning of October 3, 1988.

18. On October 6, 1988, the brief was filed with this Court by Appellee. Also on that date, Mr. Merrill contacted your declarant and indicated the Government had decided to take a new position in the matter and was seeking the permission of this Court to file a brief in support of the Appellant, and that a copy of such motion should have been received by Appellee.

19. On October 7, 1988, a rough draft was received by Appellee, and the actual motion itself was received on October 11, 1988.

I declare under penalty of perjury that the foregoing is true and correct. Executed at Merced, California on October 12, 1988.

Dennis A. Cornell,
Attorney for Appellee

Declaration of Cathryn A. Lamb, Legal Assistant to Dennis A. Cornell, Attorney for Appellee

I, Cathryn A. Lamb, declare:

1. I am employed as a legal assistant to Dennis A. Cornell, Attorney for Appellee.

2. On The afternoon of September 29, 1988, Mr. Cornell informed me he would be in trial, out of town, the next day and requested I contact Sandy Nelson at the Clerk's Office of the U.S. Supreme Court regarding a possible extension of time in which to file the Appellee's brief on the merits.

3. On the morning of September 30, 1988, I telephoned Ms. Nelson, and stated to her the Solicitor General's office indicated we could get an extension due to the change in their position. I did not receive an assurance from Ms. Nelson that an extension would be granted for that reason, but rather Mr. Cornell would have to send a written request. We discussed the time it would take to file such a request, and I was informed by Ms. Nelson that a decision would be made after receipt of the request and, appropriately, no guarantee or assurance could be granted over the phone.

4. I informed Mr. Cornell of the conversation in the early evening of September 30, 1988, when he telephoned his office.

I declare under penalty of perjury that the foregoing is true and correct. Executed at Merced, California on October 12, 1988.

Cathryn A. Lamb,
Legal Assistant to
Dennis A. Cornell